

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7330

To be argued by
HERMAN E. COOPER

ORIGINAL

B

P/S

In The
United States Court of Appeals
For The Second Circuit

BAY POINT CORP.,

Plaintiff-Appellant.

vs.

REPUBLIC NATIONAL BANK OF NEW YORK.

Defendant-Appellee.

*On Appeal from the United States District Court for the
Southern District of New York*

BRIEF FOR DEFENDANT-APPELLEE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7330

BAY POINT CORP. ,

Plaintiff-Appellant,

against

REPUBLIC NATIONAL BANK OF NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

STATEMENT OF THE ISSUE

Was it an abuse of judicial discretion to deny the plaintiff's motion for a voluntary dismissal without prejudice, under Rule 41(a)(2), and to order an involuntary dismissal with prejudice under Rules 37(a) and 41(b) for failure to prosecute and wilful failure to comply with orders of court?

STATEMENT OF THE CASE

This brief is submitted in opposition to plaintiff's appeal (i) from an order denying its motion for voluntary dismissal without prejudice, and (ii) from a judgment dismissing this action with prejudice.

The grounds urged for reversal rest upon the contention that the order and judgment below resulted from an abuse of discretion. District Judge, Hon. Charles L. Brieant, Jr., is taxed with having acted arbitrarily and capriciously. Plaintiff's brief variously characterizes the judicial conduct as marked by "frustration", "impatience", "irritation", "harshness" and "ire" while engaging in "extensive debate" with counsel whereby: "The situation became further confused". (B. 4, 12, 19, 20, 21) The District Court is also not only charged with causing "procedural chaos", but engaging in "unnecessary debate". (B. 15)

Plaintiff attributes denial of its motion as "due almost entirely to his [Judge Brieant] suspicion that the New Jersey lawyers were somehow trying to deprive his court of jurisdiction", (B. 11) and that the defendant threw "the case into a state of procedural chaos which led the District Court Judge to become confused and irritated to the point where he committed the error of denying the plaintiff's motion for voluntary dismissal". (B. 9) Even more derogatory was a blunt reflection on

Judge Brieant's integrity. "Using Mr. Achee's inability to appear as the basis for avoiding the confusion caused by the restraint on the New Jersey Superior Court, he dismissed the plaintiff's action with prejudice." (B. 13)

The District Court, in dismissing the complaint with prejudice, declared inter alia from the bench: (A. 240, 241)

"I won't impose any costs, but I will not permit any more of the dilatory tactics and the failure to prosecute which we have had in this case.

I am founding my determination both on Rule 37 and also on Rule 41(b). I think there has been a total failure of prosecution as far as this Bay Point Corporation is concerned; a failure to cooperate with the directions of the Court, a failure to honor prior commitments, and a failure to cooperate with the Magistrate which has also been reported to me, although I have no documentation of it, and it is so ordered, based on the transcript here, and I am also vacating the stay which was granted with respect to the New Jersey litigation."

The Record not only supports the findings and decision of Judge Brieant but indicates that the conduct of plaintiff and its New Jersey counsel would have tried the patience of an even more equitable Judge. Plaintiff's motion for an involuntary dismissal without prejudice, two years from commencement of the action, came after

failure of plaintiff's adroit efforts at forum-swapping, coupled with wilful disregard of orders by the District Court for plaintiff's submission to deposition.

Plaintiff's recital of the facts, however irrelevant to this appeal, does more than point up the complexities of this litigation. The extended account underscores plaintiff's calculated frustration of defendant's need for complete disclosure to adequately prepare for trial. The Record bears out that plaintiff's repeated and calculated failures to comply with outstanding orders preceded and culminated with the fourth and peremptory order, also unheeded by plaintiff. The brief strays from the facts reflected by the Record when it glosses over plaintiff's culpability and seeks to attribute responsibility for the delays to defendant.

Plaintiff's continued disregard of orders to be deposed resulted in impending imposition of sanctions. Alternatively, the District Judge suggested a voluntary dismissal of the action. This was based on his understanding of agreement between counsel reached in open court, and supported by his notes, that such disposition would effectively be with prejudice and so res adjudicata. In the words of the Court: "a final consequential determination of a lawsuit" (A. 232) However, plaintiff's counsel had second thoughts and demurred. Had the District Judge or defendant acquiesced in this change of position,

plaintiff would have achieved what it failed to obtain through manipulating the New Jersey proceedings — sidetracking of jurisdiction in this Court over transitory issues involving a national bank headquartered in this district and protected against suit elsewhere under Title 12 U.S.C. Section 94. That statute and its applicability to this action was the basis for transfer of venue by Judge Frederick B. Lacey from the United States District Court for the District of New Jersey to this District Court on June 1, 1973. (A. 48)

Plaintiff's obvious purpose in balking at dismissal with prejudice was to escape the sanctions due for repeated disobedience of court orders, while retaining its litigating posture against the defendant-bank in the New Jersey Superior Court on the transitory issue of mortgage contract validity and breach.

STATEMENT OF THE FACTS

The facts relevant to the issues presented for review are those which bear on the challenged exercise of discretion by Judge Brieant.

This action has been pending since April 30, 1973. Plaintiff's motion for unconditional voluntary dismissal without prejudice was made by Show Cause Order dated March 28, 1975, returnable April 3, 1975 and first heard April 24, 1975. The motion was denied after a second and final hearing on April 28, 1975, as made belatedly

and in bad faith. The District Court thereupon dismissed plaintiff's action with prejudice and defendant's counterclaim without prejudice.
(A. 124)

The relevant events which led to the order and judgment entered April 28, 1975 amply support this exercise of discretion by the District Judge. Upon transfer of the action to this Court on June 1, 1973, defendant promptly noticed oral deposition of the plaintiff's president and principal stockholder, C. J. Achee. Deposition began on June 28, 1973 and continued on July 10, 1973, being then adjourned for resumed examination upon plaintiff's production of requested documents. Neither plaintiff's witness nor its documents was ever produced for complete discovery.

On September 26, 1973, The Mayer Corporation sued plaintiff in the New Jersey Supreme Court, Ocean County for contract breach involving the mortgaged property. This was followed by the Laird foreclosure suit in that court on its mortgage, with amended complaint filed December 21, 1973. Thereafter another foreclosure was commenced by Federated Mortgage Investors, holders of the first mortgage.

Plaintiff's brief attributed its fiscal collapse to defendant's alleged breach of the mortgage contract which allegedly caused these lawsuits as well as cancellation of a mortgage commitment from Chase Manhattan Bank [sic].

Plaintiff's motion for voluntary dismissal without prejudice had significant antecedents. At pre-trial on January 30, 1974, Judge Brieant had again pressed plaintiff to resume being examined. Instead of submitting to deposition or then timely moving for a voluntary discontinuance, plaintiff elected to serve and file a supplemental pleading on February 11, 1974. Defendant answered and counterclaimed on February 27, 1974. Plaintiff answered the counterclaim March 13, 1974.

It then appeared that the Laird foreclosure suit, if expeditiously concluded, would settle the amount of the mortgage indebtedness and leave for determination in this Court the issue of entitlement thereto and the damages cross-claimed for breach of the mortgage contract. Accordingly, the parties, on March 13, 1974, with aid of the District Court, consented to a stay of this action "pending a determination by the Superior Court of the State of New Jersey fixing and determining the amount due, if any, upon the indebtedness secured by the mortgage referred to in the complaint herein, or until the further order of this Court".

(A. 86-87) This was based on a prediction by plaintiff's counsel of early trial in New Jersey. The order further provided for transfer to the Suspense Docket of this Court, with provision for restoration on motion to the docket of Judge Brieant.

The New Jersey foreclosure suit did not move with the celerity plaintiff had predicted. Instead, the pre-trial proceedings were preoccupied with plaintiff's efforts to test the validity of defendant's mortgage and the claim of breach of the mortgage contract in that Court. Despite defendant's active resistance and continued reliance on jurisdiction in this Court of these transitory issues, it appeared increasingly that the New Jersey Court would improperly assume jurisdiction of these issues at plaintiff's instance. (A. 158-159)

On defendant's motion, and after hearing, the District Court, by order dated December 3, 1974, vacated that stay (A. 86) and transferred the action from the Suspense Docket to the Judge's docket as an active case. (A. 88) Defendant's motion also sought a stay of the New Jersey proceedings on the ground that the plaintiff was there attempting to divest this Court of jurisdiction by litigating the transitory issue as to validity and breach of the mortgage contract upon which plaintiff's action and defendant's counterclaim were based. Such a restraint was then withheld.

Judge Brieant's order further directed that Discovery "be resumed and shall be conducted with diligence" and noted in denying the stay: "Obviously, to the extent that Court [N.J.] may lack jurisdiction over a party or the subject matter of a claim, our

jurisdiction will not be affected". (A. 88)

Plaintiff's counsel thereafter agreed to submit Mr. Achee for a resumed deposition on the 6th and 7th of January, 1975. The witness appeared on January 6, 1975 but failed to continue such examination the next day, as scheduled, or at any time thereafter.

In an effort to expedite resolution of the issues in this Court, defendant moved, returnable January 9, 1975, for a separate trial of the issue as to the validity of the mortgage and for a stay of the New Jersey foreclosure proceedings as to said issue.

At the hearing before Judge Brieant on January 9, 1975, the District Judge considered a pre-trial statement of the issues proposed by plaintiff to be tried in the New Jersey action and accepted as such by the Judge of that Court. The Court also considered a proposed order then pending before the New Jersey Judge to the same effect. After hearing extended argument, Judge Brieant granted a stay, and found: (A. 158-159)

"that the Bay Point Corporation [plaintiff] proposes to try in that foreclosure proceeding the transitory issues which the bank has a right under the Federal Statute to try in this venue and that it proposes to obtain a judgment there which it believes will be res adjudicata or collateral estoppel as to those issues in this case and which deprive the defendant of its rights to try this

action, which incidentally was not initiated by the bank, but by Bay Point."

"This conduct is inequitable and it threatens to oust this Court of its jurisdiction in this action and it is necessary in aid of the jurisdiction of this Court to issue at least a limited injunctive order to prevent this conduct".

Referring to the proposed New Jersey order, the District Judge found: (A. 161)

"The Court concludes that limited injunctive relief should be granted which will prevent achievement of any judgment or decree in the New Jersey Superior Court in the Laird foreclosure action which will have the effect of constituting a bar of judgment or a defense or affirmative basis for the assertion of collateral estoppel or res judicata as to the underlying issues in this case."

The order entered January 29, 1975 granting defendant's motion also provided that this action be marked preferred on the Civil Calendar, that the New Jersey Court not be precluded from adjudication of other issues and that discovery proceedings continue in both courts under their respective Rules. (A. 89)

On February 18, 1975, plaintiff moved for dissolution of the restraints provided by the order of January 29, 1975. Defendant cross-moved for an order to punish for contempt under Rules 65 and 70. Both motions were heard on February 28, 1975. Decision was

reserved.

At the hearing of February 28, 1975, defendant's counsel pleaded vainly for the resumption of Mr. Achee's examination:

(A. 223)

"If they will give me a day when Mr. Achee will appear"

and again: (A. 224)

"If they will give me a fixed date when I can proceed to complete my examination of Mr. Achee - he owes me a number of exhibits which they promised to produce - we are all finished with this.

I tell your Honor that before the next several weeks are out we should have completed depositions.

I am doing all of this subject to other pressing engagements, but I am prepared to make the sacrifice. I will sit with them at night; I will sit with them whenever they want to."

Magistrate Schreiber thereafter conducted pre-trial conferences on March 17, 1975, March 20, 1975, March 25, 1975 and March 31, 1975. Each of these was primarily concerned with expediting depositions of Mr. Achee. None was fruitful in effecting his further examination, despite emphatic directives to that effect.

Finally, on April 24, 1975, at 5:00 P. M. counsel for the parties appeared at a pre-trial conference before Judge Briant. As the Judge noted, plaintiff's counsel had agreed that Mr. Achee

would appear that morning for deposition and that he "did not appear in accordance with the understanding of counsel". (A. 229) No advance notice of his absence had been provided to defendant's counsel who was ready to proceed at the fixed time. The Court also declared that despite Mr. Achee's other interests which caused the absence "[T]here is no basis for not honoring the commitment to be here in accordance with Magistrate Schreiber's directions..." (A. 230)

Mr. Schaul, counsel for plaintiff, responded to the Court's request "as to how this matter is to be disposed of" with respect to the sanctions under consideration. He proposed "that this action be voluntarily discontinued and...without prejudice." (A. 230) The Court indicated his recollection that the "understanding"... reached by counsel before him called for a "final judgment entered adjudicating these particular issues on the merits", a "final consequential determination of a lawsuit," and that "they [plaintiff] wouldn't bring any action for damages in any forum". (A. 232) Mr. Schaul demurred. Thereupon, the Court resumed: (A. 235)

"I am now making a direction on this record that Mr. Achee will be present in this courthouse, he will report to room 519 at 9:30 on Monday morning and he will submit to his deposition, which will be conducted under my direct supervision and will proceed until conclusion and I further tell you that it is my

intention, should he not comply fully and fairly with my direction, to make a finding that he has abused the process of this Court, that he has neglected to prosecute this litigation in behalf of Bay Point Corporation, which I regard in some sense as his alter ego, that a reference to the docket sheets here will indicate a neglect and failure to prosecute and that Rule 41B of the Federal Rules of Civil Procedure justifies me and I will do so on Monday morning to dismiss his complaint with prejudice so you kindly get on the telex and you tell him in whatever place he is that the word from the Court is, be there."

On April 28, 1975, Mr. Achee did not appear. The Court again noted his failure "to submit to his three-times adjourned deposition as required by my prior order, and I am noting that he is in default". (A. 238) At which point, defendant moved under Rule 37 to dismiss for wilful failure to comply with the outstanding order. (A. 239) The Court rejected the proffered excuse by plaintiff's counsel for Mr. Achee's non-appearance in view of his prior record of repeated non-compliance. (A. 240)

A final order was entered on April 29, 1975 dismissing the within action with prejudice, and without costs, for failure to give discovery and failure to prosecute. The counterclaim was dismissed without prejudice. (A. 124)

The record in this case is replete with instances of plaintiff's disregard for judicial directives and is marked by repeated efforts to deprive the Court of jurisdiction. This is not a matter in which sanctions were applied for a single excusable failure to appear for discovery, but of recurrent failures over a two-year period. Most significant of plaintiff's motivation was the belated offer of voluntary dismissal without prejudice, in lieu of sanctions, after being called to account by the District Court. Such a dismissal would have rewarded, not punished, plaintiff by lifting the threat of merited sanctions and leaving plaintiff free to pursue its remedies in the New Jersey Court despite 12 U.S.C. 94 and the consequent hardships on defendant. The discretion vested in Judge Brieant was not abused but properly exercised in light of all the facts which impelled dismissal of the action with prejudice.

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED THE ACTION WITH PREJUDICE.

At issue here is whether the District Court abused the discretion provided under Rule 37(b)(2)(C) by dismissing the action for plaintiff's wilful failure to obey a series of orders directing submission to deposition. The test under the Rule is whether the sanction imposed was "just". The measure of what was "just" necessarily depends on

the circumstances of each case as objectively evaluated by the District Judge charged with responsibility for conduct of the particular litigation.

Alternatively, Rule 41(a)(2) invests the Court with the inherent power to dismiss an action, "upon such terms and conditions as the court deems proper". Rule 41(b) similarly provides authority for involuntary dismissal of an action for "failure of the plaintiff to prosecute or to comply with these rules or any order of Court". (emphasis added)

The District Court dismissed this action with prejudice under both Rules as warranted by plaintiff's wilful and repeated disobedience of court orders. This included not only refusals to be deposed but conduct in open derogation of the jurisdiction of the Court, lack of cooperation with the Trial Judge and Magistrate as well as other dilatory tactics constituting "failure to prosecute". (A. 233)

Plaintiff would make it appear as if the District Judge acted summarily and too drastically on the basis of a single and excusable act of non-compliance. The thrust of the cited authorities is misdirected at that premise. Plaintiff's brief either ignores or disclaims responsibility for the events leading to that single operative failure to appear for deposition on April 28, 1975, following the failure to appear on April 24th as directed by the Magistrate and agreed to by

plaintiff's counsel.

This solitary lapse on April 28th was not an isolated event and cannot be properly considered out of context as the only factor to be scrutinized on review. Standing alone, it might well have warranted a lesser sanction than dismissal. Weighed against the background of a deliberately thwarted discovery and accentuated by demonstrated disdain for the efficacy of court order, the plaintiff invited the most drastic and not the lesser of sanctions. Any other outcome would have underlined the toothless quality of dismissal as the ultimate weapon to dissuade litigants from such wilful disobedience and lack of cooperation with the Trial Court.

We do not challenge any of the authorities cited in plaintiff's brief as reflecting the broad proposition that the sanction of dismissal should only be invoked sparingly because it is drastic. The cited cases involved non-compliance with interrogatories, document production, appearance orders or difficulty with counsel representation — all clearly excusable and not wilful on their face. Emphasis in the cited cases is upon the degree of non-compliance sufficient to warrant dismissal. The Courts there reversed for excess use of dismissal for relatively minor non-adherence. None touched a situation such as present here.

Imposition of sanctions was past due since the plaintiff's witness exhibited cavalier disregard of the discovery rules prior to as well as since ordered to submit to deposition. It must be assumed

that the Court acted justly and with due regard for proper administration of the Rules. The Trial Court was in the most favorable position to reach a value judgment as to which sanction was merited by the particular circumstances involved. Confronted by a course of conduct of wilful disregard in at least three instances preliminary to the final non-appearance, the District Court was left with little choice. (A. 233) These transgressions came after the Magistrate had also, on four separate occasions, cautioned and directed the plaintiff's witness to cooperate.

At what point does constant and reiterated disregard of court rules and orders become contumacious and intolerable? How many warnings must a recalcitrant witness receive before the ultimate sanction of dismissal becomes "just"? How serious a failure to comply is required for justification of dismissal of the action?

We submit that there was enough in the record before the Court to establish that the plaintiff acted wilfully. There were ample opportunities before the final hearing to appear and be absolved of the earlier failures. Yet, plaintiff persisted in disobedience. (A. 233, 234)

It cannot be fairly contended that Judge Briant was less than exceedingly patient and forbearing until persuaded that his consideration towards the plaintiff was being abused. (A. 235)

Even then the Court dealt gently but firmly with plaintiff's counsel who was placed in an awkward position by his client. But it was an inescapable fact, confirmed by the Trial Judge, that counsel had been prepared to and did indicate acceptance in open court on April 24 of a voluntary dismissal with prejudice in lieu of the sanction of dismissal. (A. 232) It appeared that the absent client was adamant and obliged his counsel to recant. Only at that point did the Trial Court exercise judicial discretion by order of dismissal with prejudice.

The leading case on Rule 37 is Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S. Ct. 1087, 1094, 2 L. ed. 2d 1255 (1958). While Justice Harlan's opinion for the Court dealt primarily with the Constitutional limitations on the Rule, he reduced the scope of judicial concern to require either "willfulness, bad faith or any fault of petitioner" as an indispensable prerequisite for the ultimate sanction of dismissal. The plain meaning is that the sanction of dismissal is not too drastic when it is evident that non-compliance is the product of "willfulness, bad faith or any fault".

This Court in Flaks v. Koegel et ano., 504 Fed. 2d 702, (1974) refined Societe by providing a judicial measuring rod for determining presence of any or all of the three separate criteria

fixed by that decision. The rule was stated to be that wilfulness cannot "be determined [solely] on the basis of conflicting and competing affidavits" but requires an "evidentiary hearing". (page 713) This assumes existence of a genuine dispute as to non-compliance. The only question here was not as to past transgressions but as to whether excusable inability prevented plaintiff's witness from appearing on April 28, 1975 so as to lift the threat of sanctions for such prior conduct. None of the preceding inexcusable failures was disputed, but were in fact conceded by plaintiff's counsel to have been at least three. (A. 233)

The District Court conducted two extensive hearings on April 24 and April 28, 1975, primarily concerned with non-compliance and its consequences. (A. 228 - 244) This was in addition to referenced but unrecorded discussions with counsel at Pre-Trial Conferences. Judge Brieant did not decide on papers but made findings on the basis of the hearings as transcribed and his direct knowledge of what had transpired. (A. 235)

This was not the kind of judicial disposition frowned upon by Flaks as inadequate to establish "wilfulness, bad faith or any fault", except by an "evidentiary hearing". In that case, unlike here, the party sanctioned had moved for relief under Rule 60(b). The Court reversed and remanded, leaving ultimate decision to the Trial Court as to whether the default judgment should stand. (page 713)

The plaintiff's brief deals with the dismissal for failure to prosecute under Rule 41(b) by devoting considerable indignation to the conduct and motives of the Trial Judge — who is berated as intemperate, and impatient to dispose of the litigation to cover a judicial error. (A. 235)

What constitutes "failure to prosecute", or a wilful disobedience of orders depends on the facts of the particular case. The District Court particularized the findings for dismissal as dilatory tactics as well as lack of cooperation with the Court and Magistrate. (A. 240, 241) None of this was contested at any of the hearings before the District Judge.

The Supreme Court in Link v. Wabash R. Co. 370 U.S. 626, 629-633, 634, 635-636, 82 S. Ct. 1386, 8 L. ed. 2nd 734 (1962) sustained a dismissal by the district court, sua sponte, for want of prosecution where plaintiff had been dilatory and his counsel had failed to appear at a scheduled Pre-Trial Conference. No question of wilfulness was involved.

Judge Harlan summed up the scope of Rule 41(b) in Link, supra, as follows:

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power

to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts.

The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to ~~manage~~ manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void.

Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion.

We need not decide whether unexplained absence from a pretrial conference would alone justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of the plaintiff. For the District Court in this case relied on all the circumstances that were brought to its attention, including the earlier delays..."

Apropos of Judge Harlan's declarations, Judge Brieant expressed his more contemporary concern with the impact of dilatory litigants on the functioning of the Court, as follows:

"This Court simply must conduct its docket. We have some eight or nine thousand pending civil cases in this court, and if people behaved as Mr. Achee has done, we would never be able to move any of the cases." (A. 241)

Plaintiff's brief climaxes on a sour and ungracious note that disparages the Trial Judge as motivated by "frustration and irritation" which was vented by punishing the plaintiff as the "object of the irritation". We regret that accomplished *and* respected counsel would resort to such a cheap shot.

CONCLUSION

For the foregoing reasons the order and judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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500 Fifth Avenue,
New York, N. Y., 10036

Dated: September 30, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BAY POINT CORP.,

Plaintiff-Appellant,

against

REPUBLIC NATIONAL BANK OF NEW YORK,

Defendant-~~Respondent~~
Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

James A. Steele

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.

That on the 2d day of October 19 75 at 30 Rockefeller Plaza, N. Y., N. Y.

deponent served the annexed Appellee Brief

upon

Patterson Belknap & Webb

the Attorneys in this action by delivering ² a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 2d

day of October 19 75

James A. Steele
Print name beneath signature
JAMES A. STEELE

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977